No. 91-554

IN THE

Supreme Court of the United States

October Term, 1991

MILTON REINER,
Petitioner,

vs.

TOLEDO HOTEL INVESTORS
LIMITED PARTNERSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Toledo Hotel Investors Limited Partnership ("THILP"), respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case. The opinions of the Sixth Circuit and United States District Court for the Northern District of Ohio, Eastern Division, are unreported; however, they are reproduced in the Appendix to the Petition, pages A1-A6 and A7-A15, respectively.

STATEMENT OF THE CASE

The Petition in this matter results from the district court's denial of a motion to vacate a default judgment under Federal Rule of Civil Procedure 60(b). The Sixth Circuit Court of Appeals affirmed the decision and also denied Petitioner's subsequent motion for reconsideration. In bringing the present Petition, Petitioner is simply seeking to have this Court revisit the facts of this case. This case presents no issues which merit review by this Court, and despite Petitioner's attempts to create a conflict among the Circuits, none exists on the facts of this case.

While Respondent does not disagree with some of the basic facts presented in Petitioner's Statement, Respondent does take issue with the analysis and conclusions in a number of respects. Therefore, pursuant to Supreme Court Rule 22.1, Respondent offers the following statement to correct certain inaccuracies and omissions in the Petition.

Petitioner's Statement of the Case begins in late July, 1989, when Petitioner received the entry of default against him sent by Respondent's counsel. This factual starting point omits probably the most important time period of the lawsuit for the purposes of this Petition—from October, 1988, until May, 1989—when Petitioner actively and admittedly avoided service of process. The record facts indicate that Petitioner admitted that it was his "practice" to refuse any and all certified mail during this time period because he knew people were looking to sue him. (N.T., M. Reiner at 43.) This explains why Respondent's attempts at certified mail were returned as "refused." Petitioner also admitted that he received at least two copies of Respondent's

complaint through regular mail and that he was fully cognizant of the requirement of filing an answer to the complaint. As both the district court and court of appeals found below, Petitioner was therefore responsible for a nine-month delay in this lawsuit.[1] It was only after Petitioner ignored the summons and Respondent secured an entry of default against Petitioner in late July, 1989, that he became sufficiently interested in this lawsuit to contact his attorney-daughter, Lori Reiner.

Lori Reiner's "attempt" to retain Ohio counsel to represent her father consisted of one phone call to one attorney in Cleveland, Ohio. When that attorney required a $50,000 retainer, Ms. Reiner simply abandoned her efforts to find local counsel for her father, and filed an entry of appearance for herself and Bennett, Bricklin & Saltzburg, the Philadelphia law firm at which she was an associate. She then began preparing a defense to the entry of default.

After conducting some initial legal research, Ms. Reiner contacted Howard Green, M.D., a psychiatrist who had previously treated her father. Apparently, Ms. Reiner determined that her father's "illness" prevented him from responding to the lawsuit in 1989. She drafted an affidavit for Dr. Green in which Dr. Green opined that Petitioner had been suffering from severe depression since 1987, and that because of the illness, Petitioner was unable to cope with certain situations, like the lawsuit.

[1] Petitioner argues that there is insufficient evidence to attribute the entire nine-month delay in this case to his actions. Both courts found otherwise. Furthermore, the issue is not length of time one is successful in thwarting the judicial system—it is *intent* to do so. Petitioner clearly intended to and did evade service.

Having finalized the Green affidavit in February, 1990, Ms. Reiner confessed to her father and the partners at BB&S that contrary to what she had previously told her father and BB&S about the status of the lawsuit, she had not filed a motion to set aside the entry of default or attended any of the properly-noticed status calls or default hearings. By that time, Respondent had procured a default judgment against Petitioner. BB&S then assumed responsibility for defending Petitioner's interests and shortly thereafter, filed a motion to vacate pursuant to Federal Rule of Civil Procedure 60(b).

The motion, based solely upon Rule 60(b)(1) "excusable neglect" principles, was premised upon Petitioner's alleged illness, as supported by the Green affidavit, as well as the alleged "excusable neglect" of Ms. Reiner. Petitioner's failure to respond to service of the summons and complaint was attributed entirely to his mental illness. Ms. Reiner's conduct was explained as the result of her emotional incapacity due to her father's illness. Respondent's discovery, however, made it clear that the Green affidavit was "false and misleading" because Ms. Reiner, in drafting the affidavit, had failed to mention the relevant time period to Dr. Green. In fact, Petitioner was not mentally ill during the time period in which he was actively evading service of the summons and complaint. The affidavit was withdrawn by Petitioner.

Petitioner's next brief not only withdrew Dr. Green's affidavit, it also discarded the emotional incapacity and excusable neglect defenses of Petitioner and his attorney. In their place, Petitioner contended that he was too impoverished to respond to the lawsuit. The conduct of Ms. Reiner was now conceded to be sanctionable and

characterized as "culpable" and "gross misconduct" in a belated attempt to utilize Rule 60(b)(6) for relief from the default judgment. Petitioner's Statement of the Case recognizes implicitly that his Rule 60(b)(6) arguments are improper, and attempts to excuse this by arguing that poverty is somewhat "related" to his mental incapacity argument and that he believed the mental incapacity argument was "more than sufficient" to explain his misconduct. (Petitioner's Brief, p. 9.) Unfortunately for Petitioner, it was not sufficient, and as the district court recognized, the Rule 60(b)(6) argument was improper because it went well beyond simply replying to Respondent's argument in its brief in opposition.[2]

Petitioner also argues that the district court improperly concluded that Petitioner had not set forth a meritorious defense for the fraud alleged against him. In fact, the record is absolutely devoid of *any* facts, alleged or otherwise, which would constitute a defense to the personal fraud allegations against Petitioner.

[2] Not only did the lower courts determine that the poverty excuse was improper because it was first raised in Petitioner's reply brief, the courts noted that there was absolutely no evidence in the record to support Petitioner's claim of impecunity.

REASONS FOR DENYING THE PETITION

1. Petitioner's first question was not preserved below.

Although presented to this Court as a general Rule 60(b) question, Petitioner's first question for review is based entirely and specifically upon Rule 60(b)(6). Even the most cursory glance at the Petition indicates that the only mention of Rule 60(b)(1) is an introductory statement that he "petitioned the district court for relief under both Rule 60(b)(1) and 60(b)(6)." (Pet. at p. 15). Having said this, Petitioner then jettisons Rule 60(b)(1) and argues that Rule 60(b)(6) should not be utilized to punish an "innocent" client for the misdeeds of his attorney.

Despite his virtual complete reliance on Rule 60(b)(6) in the Petition, the applicability of Rule 60(b)(6) is not properly before this Court because Petitioner did not preserve it below. As discussed in Respondent's Statement of the Case, Petitioner did not even mention Rule 60(b)(6) or discuss its applicability to the case until his lengthy reply brief, which was a reply brief in name only. Only after Respondent had rebutted the Rule 60(b)(1) "excusable neglect" arguments in its opposition brief did Petitioner seek to utilize Rule 60(b)(6) as grounds for relief.[3]

[3] Rule 60(b)(1) and 60(b)(6) are "mutually exclusive." *See Klapprott v. U.S.*, 335 U.S. 601, 613 (1948) and *Liljeberg v. Health Services Acquisition Corp.*, 109 S.Ct. 2194, 2204, n.14 (1988). Furthermore, Petitioner's Rule 60(b)(6) arguments are factually improper because they are simply the same excuses he unsuccessfully asserted under Rule 60(b)(1). Instead of "excusable neglect," the conduct of his attorney is now described as "gross misconduct" in an attempt to fit that misconduct into Rule 60(b)(6).

The district court recognized Petitioner's belated attempt to argue Rule 60(b)(6), as it began its Memorandum and Order of August 15, 1990, by stating that Petitioner "moves, pursuant to Federal Rule of Civil Procedure 60(b)(1), to set aside the default judgment . . . ." (Appendix to Pet., p. A-8). In discussing Petitioner's new impecunity argument, the court also noted that Petitioner's reply brief "presented new issues to this Court and was not confined to replying to [Respondent's] response." (Appendix to Pet., p. A-13, n.3). Accordingly, the district court refused to even address Petitioner's Rule 60(b)(6) arguments. The court of appeals also did not consider Rule 60(b)(6) as a basis for relieving Petitioner from the default judgment, as it concluded its opinion by stating that "(t)he conduct of defendant and his counsel in this case far exceeds the type of conduct that can be deemed 'excusable neglect' "—the standard in Rule 60(b)(1). No mention was made of the Rule 60(b)(6) standard in the *per curiam* decision. Accordingly, neither the district court nor the court of appeals considered Petitioner's Rule 60(b)(6) arguments, and this Court should afford Petitioner the same lack of consideration.[4]

2. **No conflict exists among the courts on the correct facts of this case.**

Petitioner's attempt to create a conflict among the courts in order to seek another review of the facts overlooks the same essential fact that he has overlooked

[4] Petitioner attempts to claim that his "financial distress" argument in his reply brief is somehow "related" to his "mental incapacity" defense on which he first relied (Pet., p. 9). Neither of the lower courts considered them to be related, as his poverty plea was not even considered by the courts. Similarly, this Court should recognize this "related" argument for what it is—an attempt to bootstrap a belated defense to gain this Court's jurisdiction.

at every juncture of this case—his own culpable conduct. The issue presented for review by Petitioner and the entire discussion is based upon whether an innocent party should be absolved from the sins of his attorney under Rule 60(b)(6). Petitioner suggests that a conflict between the circuits exists on this issue. Any such conflict, if one exists, is totally irrelevant to this Petition because the true facts do not present that issue for review. In fact, both the district court and the court of appeals relied upon "a number of factors" in determining that Petitioner himself was not an innocent party but was culpable as that term is defined by the Sixth Circuit in *Invst Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391, 399 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987).

First, both courts found that "Reiner actively and admittedly avoided service of process in this case." (Appendix to Pet., p. A-5.) Second, he submitted "false information" to the court. (Appendix to Pet., p. A-5.) Third, he advanced a poverty excuse after his mental illness ploy was brought to light by Respondent, and then submitted no financial information to support that new excuse. (Appendix to Pet., p. A-5.) Thus, even without the imputation of his attorney's misconduct, the lower courts still had three separate and independent grounds for culpable conduct *on the part of Petitioner himself* to deny his motion to vacate. Petitioner's entire argument ignores his culpability and questions whether it is proper to attribute the "inexcusable neglect" of Lori Reiner to him. The "innocent" party which is crucial to Petitioner's argument simply does not exist in this case. The "conflict" among the lower courts upon which Petitioner rests jurisdiction of this Court similarly does not exist.

Indeed, every case cited by Petitioner requires that in order to take advantage of Rule 60(b)(6),[5] the client must be blameless. For example, in *L.P. Stuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964), the court was careful to note that "(o)n the part of Matthews himself, there was no neglect." *See also United States v. Cirami*, 563 F.2d 26, 35 (2d Cir. 1977) (movants' conduct themselves "not explainable as 'inadverten(t), indifferen(t), or careless disregard of consequences.' ") (quoting *Klapprott v. U.S.*, 335 U.S. 601, 603 (1948)); *Jackson v. Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1978) (required client be blameless and "not (to have) personally misbehaved" before 60(b)(6) can be utilized; *Boughner v. Secretary of HEW*, 572 F.2d 976, 979 (3d Cir. 1978) ("absence of neglect" by the parties "is prerequisite to Rule 60(b)(6) relief"); and *Carter v. Albert Einstein Medical Center*, 804 F.2d 805, 807 (3d Cir. 1986) (court should view extent of party's personal responsibility for default).

The law is clear in the factual scenario presented in this case. A culpable client cannot utilize Rule 60(b) to gain relief from a judgment entered because of the misconduct of the client and the client's attorney. That rule was recognized and correctly applied below. Both the district court and the court of appeals held, based on *Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190 (6th Cir. 1986), that because the Petitioner himself was culpable unlike the client in *Shepard Claims*, Rule 60(b) relief was not available. Petitioner has cited no case which holds otherwise. This Petition simply attempts to create an issue where the facts to support that issue are nonexistent.

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[5] This argument, of course, assumes that Rule 60(b)(6) is properly before this Court, which Respondent believes is a faulty assumption.

Petitioner also challenges Respondent's use of *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1948) for the proposition that attorney misconduct is generally imputed to the client. Petitioner charges that the application of *Link* in the Rule 60(b) context has created a "considerable amount of consternation for lower courts." That is untrue, as courts consistently have imputed misconduct of an attorney to the client when the client has also acted wrongfully. That is precisely what the lower courts did in this case by properly distinguishing *Shepard Claims Service, supra*, because the client was innocent in that case, unlike Petitioner. Whether under Rule 60(b)(1) or 60(b)(6), in order to avoid a default judgment, it is beyond dispute that the client must be blameless. Accordingly, there is no need for direction to the lower courts, as they have consistently and correctly determined the issue.

3. The courts below correctly decided the issue of the required specificity of defenses in the Rule 60(b) context.

The second question for review in the Petition relates to the required specificity of the pleading obligations of defaulted litigants. Petitioner maintains that the court of appeals "erected an entirely new standard of pleading for parties seeking to set aside defaults" when it held that Petitioner failed to set forth a meritorious defense as required for Rule 60(b) relief. *See Amernational Indus. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991) and *United Coin Meter Co. v. Seaboard Coastal Line Railroad*, 705 F.2d 839, 845 (6th Cir. 1983) (both requiring a meritorious defense as one of three requirements for Rule 60(b) relief). Petitioner claims that the provisions of Rule 8 apply in the Rule 60(b) context

and contends that the court of appeals applied an incorrect standard. Based on the relevant case law, the decision of the court of appeals was correct.

Petitioner's only defense to the fraud claim levelled against him personally was a general denial in his proposed answer attached to his motion to vacate. The Petition attempts to diffuse this problem by suggesting that affirmative defenses relating to the contractual performance of Petitioner's company, American Contract Designers, somehow state a meritorious defense to the fraud claim. As the lower courts correctly noted, what Petitioner's company did or did not do is not a defense to any fraud he allegedly committed himself. (Appendix to Pet., p. A-4.)

Petitioner's attempt to graft the notice pleading requirements in Rule 8 of the Federal Rules of Civil Procedure onto Rule 60(b) in order to create a reviewable issue out of the lower courts' failure to do so is unpersuasive. It is clear that it is incumbent upon the defendant to allege in his moving papers facts sufficient to constitute a valid defense to the action. More than legal conclusions, general denials, or simple assertions are required of a movant under Rule 60(b) to satisfy the burden of establishing a meritorious defense. *U.S. v. $55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir. 1984); *Gross v. Stereo Component Systems, Inc.*, 700 F.2d 120 (3d Cir. 1983); *Cassidy v. Tenorio*, 856 F.2d 1412 (9th Cir. 1988); *Maine Nat'l Bank v. F/V Cecily B.*, 116 F.R.D. 66 (D. Me. 1987).

The Tenth Circuit in fact answers precisely Petitioner's second question for review, which is whether a litigant who has defaulted is required to plead his

defense with greater specificity than required by Rule 8. As the court held in *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978):

> Unlike the simple notice pleading required in original actions, the rule relating to relief from default judgments contemplates more than mere legal conclusions, general denials, or simple assertions that the movant has a meritorious defense.

Here, Petitioner's only defense is a general denial, along with a statement that his company performed all its obligations with Respondent. That was correctly found to be insufficient by the district court and by the court of appeals.

CONCLUSION

Unsatisfied with the decisions below, Petitioner creates issues which do not arise from the facts of this case. The lower court correctly determined the facts and applied them to the relevant law; therefore, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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